IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 45 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MEMON ABDUL GAFAR HAJI N MOHMD

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Revision Application No. 45 of 1993

MR JIVANLAL G SHAH for Petitioner No. 1

MR SJ DAVE, APP for Respondent No. 1

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 25/02/2003

ORAL JUDGEMENT

The petitioner has preferred this Criminal Revision Application under Section 397 read with Section 401 of the Code of Criminal Procedure, 1973 (for short,

"the Code"), challenging the judgment and conviction order dated 08/02/93 recorded by the learned Additional Sessions Judge, Vadodara in Criminal Appeal No. 59 of 1992, under which the learned Additional Sessions Judge dismissed the said appeal of the present petitioner and confirmed the judgment and conviction order dated 29/08/92, in Criminal Case No. 278 of 1990 under which the learned Judicial Magistrate, First Class at Sankheda convicted the present petitioner for an offence punishable under Section 66(1)(b) of the Bombay Prohibition Act, 1949 and sentenced him to suffer RI for five months and to pay fine of Rupees One Thousand and in default of payment of fine to further undergo SI for one month.

2. The case of the prosecution against the petitioner was that Dy.S.P., Mr.B J Gautam carried out a raid in respect of a house at Village Naswadi on 28/12/89 on an information received by him. On carrying out the said raid, foreign liquor was allegedly found on a large scale. Thereafter, panchnama was drawn in presence of panchas and sample was collected from one of those bottles. Investigation was completed and at the conclusion of investigation, chargesheet was filed by the Investigating Officer, before the learned Judicial Magistrate, First Class at Sankheda in Vadodara District against the present petitioner as well as against Aadambhai Moosabhai Shaikh. The trial court recorded plea of the petitioner as well as of the said co-accused. After recording their pleas, the trial court found that the present petitioner was guilty for the said offence and therefore, he was convicted and sentenced as aforesaid. At the same time, the co-accused was ordered to be acquitted by the said court.

3. Feeling aggrieved by the said judgment and conviction order of the trial court, the petitioner preferred Criminal Appeal No. 59 of 1992, unsuccessfully.

4. Therefore, the petitioner has preferred this Revision Application before this Court. It has been mainly contented that the trial court has failed to consider the fact that the report of the chemical analysis of the sample was not produced on record and therefore, it was not proved on record that the liquid contained in the bottles, contained alcohol, amounting to illicit liquor. It has also been contended that there was no evidence on record to show that the place from where the bottles were allegedly seized, was a place belonging to him or that he was in possession of it. It

is, further contended that the prosecution did not examine witnesses other than police witnesses. It is further contended that sample was collected from only one bottle, though so many bottles were seized by the police, according to the prosecution case.

5. On the aforesaid considerations, it has been stated that the judgments and conviction orders recorded by the two courts below are illegal and erroneous and deserve to be set aside.

6. The petitioner has therefore prayed that the present revision application be allowed, the judgments and conviction orders of the two courts below be set aside and the petitioner be acquitted of the offence punishable under Section 66(1)(b) of the said Act.

7. On receipt of the revision application, "Rule" was issued and at the hearing today, Mr.J G Shah, learned advocate appears on behalf of the petitioner and Mr.S J Dave, learned APP appears on behalf of respondent no. 1 - State. They have taken me through the judgments of the two courts below as well through the evidence on record.

8. It has been first contended by Mr.J G Shah, learned advocate for the petitioner that though according to the case of the prosecution, the Investigating Police Officer had collected the sample from the bottle in question, the report of the Chemical Analyzer or Chemical Examiner has not been produced on record. Therefore, there was no evidence before the trial court or before the Sessions Court to come to a conclusion that the said liquid contained alcohol and consequently, it was illicit liquor.

9. The original records and proceedings were called for and even the learned APP was requested to go through the said records and proceedings. On seeing the records, it can be noticed that the report of the Chemical Examiner has not been produced on record of the trial court. It is true that it has been stated in panchnama that when the bottle was opened, it was smelling of alcohol. However, when the allegation made was that it was illicit liquor, then in that event, it was required to be proved on record that the bottles contained illicit liquor. For the said purpose, it was necessary for the prosecution to produce on record the report of the Chemical Examiner.

10. It is found that the said piece of evidence was not produced before the trial court. Therefore, it was

not proved before the trial court that the bottles contained illicit liquor. Therefore, the trial court has committed an error in law in holding that the liquid contained in the bottles seized from the alleged possession of the petitioner was illicit liquor.

11. It is also required to be seen that the trial court has recorded further statement of the petitioner under Section 313 of the said Code, at the conclusion of the evidence and on going through the statement of the petitioner, it is noticed that the said fact about the report of the Chemical Examiner was not put to him.

12. Therefore, it is amply clear that the trial court did not have the said evidence before it, to come to a conclusion that the bottles contained illicit liquor. In other words, the said finding of fact has been recorded without evidence on record of the trial court.

13. Even the Sessions Court appears to have omitted to consider the said aspect of the case. Mr.D J Vyas, an advocate practising at Vadodara has filed an affidavit that the matter was argued on behalf of the petitioner before the appellate court at Vadodara, by Mr.M G Vyas and that he was assisting him during the said hearing. That the said point was raised by the learned advocate for the appellant and yet, it has not been considered by the Sessions Court. Anyway, fact remains that there was no material before the trial court or before the Sessions Court to hold that the liquid contained in the bottles seized as aforesaid, contained illicit liquor. The trial court as well as the Sessions Court have therefore, committed an error in the eye of law, while holding that the said liquid was illicit liquor.

14. Once it is found that there was no evidence on record to show that the said bottles contained illicit liquor and once it is found that the finding to that effect has been recorded by the two courts below was without any evidence on record, then the said finding has to be treated as illegal, as not based on any material on record.

15. Once it is found that the finding of fact was without any evidence on record and consequently illegal, it would be necessary for this Court to interfere with the said finding of fact as being illegal.

16. Once it is found that the said finding of fact is illegal, there is no need to record a finding that the petitioner possessed illicit liquor, without pass or

permit, at the relevant point of time. Consequently, the petitioner could not be convicted by the two courts below for the said offence. This shows that the approach of the trial court as well as of the Sessions Court is ex-facie illegal and consequently, it has become necessary for this Court to interfere with the said judgments and conviction orders of the two courts below while exercising revisional jurisdiction.

17. In above view of the matter, this revision application is ordered to be allowed. The judgment and conviction order recorded by the learned Additional Sessions Judge on 08/02/93 in Criminal Appeal No. 59 of 1992, confirming the judgment and conviction order dated 29/08/92, recorded by the learned Judicial Magistrate, First Class at Sankheda in Criminal Case No. 278 of 1990 is hereby set aside. The petitioner herein is ordered to be acquitted of the offence punishable under Section 66(1)(b) of the Bombay Prohibition Act, 1949. Rule is made absolute. Fine, if paid, be refunded to the petitioner.

(D. P. Buch, J.)

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